No. 12612

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERWIN P. WERNER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

ERWIN P. WERNER,
611 Carlton Way, Los Angeles 28,
Appellant, In Pro. Per.

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APPELLANT'S OPENING BRIEF.

This is an appeal from the District Court, from an order of dismissal. The court refused to allow an amendment.

The complaint is in two causes of action, the first [Tr. 2] cause of action is for reformation of a lease contract, and the second cause is against the United States for money as compensation for the reasonable value for the use and occupation of land, which was the basis of the original lease. The District Court had jurisdiction of the cause by reason of the Tucker Act, 28 U. S. C. (Rev.), sec. 1346.

Facts.

The material facts alleged in the first cause of action are these [Tr. 2]: Prior to February 1, 1943, the land involved "was placed and held in trust by Mark L. Herron and * * * wife, as trustees, with directions and upon the understanding that said property would be returned" to plaintiff on demand [Tr. 3].

On February 1, 1943, the trustees, as lessor, and the United States, as lessee, entered into a lease of the land for one year at a rental of $25.00, with the option granted to the lessee to renew from year to year "provided that no renewal thereof will extend the period of occupancy * * * beyond six (6) months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27th, 1941 (Proclamation 2487)." [Tr. 3.]

Plaintiff further alleges that the words just quoted were intended "in their ordinary and popular sense to mean" and were, "on the date of the execution of said lease, understood to be 'six months from the date of the cessation of hostilities with * * * or the surrender of said Axis nations,' which surrender finally occurred on the 14th day of August, 1945 * * * (and) on the 3rd day of December, 1946, it was declared by proclamation of the President of the United States, proclamation 2714, that 'there was a sessation of hostilities of World War II.'"

The second cause of action is for money for the use and occupation of the aforesaid property after the termination of the lease up to the date of the filing of the com-

plaint, November 8, 1949. The gist of the action is found in paragraph 11 on Transcript page 6.

> "That said lease was terminated on the 14th day of August, 1945, by reason of the cessation of hostilities on the part of the Axis nations; that ever since said date of August 14, 1945, the defendant has been in actual possession and enjoyment of the said real property, that the defendant has paid no sum for said use."

The prayer is for

1. For reformation;
2. For the reasonable value of the use and occupation of said land.

The court below in its order for dismissal treats the complaint as one cause of action for the reformation of a contract as the main issue without reference to the second cause of action for the recovery of rent. The reverse is true to-wit: The action is for the recovery of money for the use and occupation of land, with the request for reformation as incidental. We quote from the order of dismissal [Tr. 31]:

> "the court now finds that the plaintiff's right of action first accrued on February 1st, 1943; that this action was commenced on November 8, 1949, which is six years following the date of accrual of such right of action."

The fallacy of this holding is that the main cause of action is for rental due the day before the filing of the

complaint and well within the six years as provided in Title 28, Sec. 2401(a), U. S. C. The reformation being incidental to the main cause of action does not lapse until the main cause of action is barred. Also, if the action for reformation stood by itself it would not start the statute to run until the discovery of the mistake which is alleged in the complaint to be [Tr. 5] June 14, 1948. A dispute as to the meaning of the words "unlimited Emergency as proclaimed by the Presidential proclamation" could not have arisen until after the unconditional surrender of the Axis belligerents on August 14, 1945. All rentals accrued between this date and the filing of the complaint. It will be noted that the defendant has paid no rent since the termination of the hostilities.

The reformation asked in the first cause of action does not ask that the language of the lease be changed but merely asked that the dispute as to the meaning of the termination of the lease be interpreted by the court below. The meaning of the words is the same whether the lease is reformed or not. This plaintiff is still entitled to his land back and the reasonable compensation for the use and occupation of the land in question. The ruling of the court below amounts to a confiscation of the property of the plaintiff, as the defendant is still in possession with no obligation to pay for the use thereof.

It is the contention of the Government that the emergency referred to in the proclamation must be terminated by an Act of Congress. The plaintiff contends the emergency defined in the proclamation is a question of fact, and the proclamation must be looked to for a definition of the "unlimited emergency."

"PROCLAMATION 2487.

Proclaiming That an Unlimited National Emergency Confronts This Country, Which Requires That Its Military, Naval, Air and Civilian Defenses Be Put on the Basis of Readiness to Repel Any and All Acts or Threats of Aggression Directed Toward Any Part of the Western Hemisphere.

WHEREAS on September 8, 1939 because of the outbreak of war in Europe a proclamation was issued declaring a limited national emergency and directing measures 'for the purpose of strengthening our national defense within the limits of peacetime authorizations',

WHEREAS a succession of events makes plain that the objectives of the Axis belligerents in such war are not confined to those avowed at its commencement, but include overthrow throughout the world of existing democratic order, and a worldwide domination of peoples and economies through the destruction of all resistance on land and sea and in the air, AND

WHEREAS indifference on the part of the United States to the increasing menace would be perilous, and common prudence requires that for the security of this nation and of this hemisphere we should pass from peacetime authorizations of military strength to such a basis as will enable us to cope instantly and decisively with any attempt at hostile encirclement of this hemisphere, or the establishment of any base for aggression against it, as well as to repel the threat of predatory incursion by foreign agents into our territory and society.

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, do proclaim that an unlimited national emergency confronts

this country, which requires that its military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression directed toward any part of the Western Hemisphere.

I call upon all the loyal citizens engaged in production for defense to give precedence to the needs of the nation to the end that a system of government that makes private enterprise possible may survive.

I call upon all our loyal workmen as well as employers to merge their lesser differences in the larger effect to insure the survival of the only kind of government which recognizes the rights of labor or of capital.

I call upon loyal state and local leaders and officials to cooperate with the civilian defense agencies of the United States to assure our internal security against foreign directed subversion and to put every community in order for maximum productive effort and minimum of waste and unnecessary frictions.

I call upon all loyal citizens to place the nation's needs first in mind and in action to the end that we may mobilize and have ready for instant defensive use all of the physical powers, all of the moral strength and all of the material resources of this nation.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this twenty-seventh day of May, in the year [seal] of our Lord

nineteen hundred and forty-one, and of the Independence of the United States of America the one hundred and sixty-fifth.

FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL
Secretary of State."

There we find the unlimited emergency is limited to a threat by "the Axis belligerents to the security of the United States." We therefore further contend that upon the unconditional surrender of the "Axis belligerents" the unlimited emergency was over as far as the lease of the plaintiff's property was concerned. The use of the plaintiff's property for the political purpose of concluding a peace treaty could not be contemplated under the terms of the lease. The President of the United States declared on the 3rd day of December, 1945, that: "there was a cessation of hostilities of World War II."

"PROCLAMATION 2714.

Cessation of Hostilities of World War II.

By the President of the United States of America

A PROCLAMATION.

With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other

United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 31st day of December in the year of our Lord nineteen hundred and [SEAL] forty-six, and of the Independence of the United States of America the one hundred and seventy-first.

HARRY S. TRUMAN.

By the President:

JAMES F. BYRNES,
The Secretary of State."

[F. R. Doc. 46-22110; Filed, Dec. 31, 1946; 1:19 p. m.]

POINT I.

When Reformation Is Incidental to the Main Cause of Action, the Statute of Limitations Does Not Run Until the Main Cause of Action Is Barred.

The treatment of this subject in Cal. Juris, is so clear and well treated that we will set it forth in full with the appropriate California decisions on the point:

> "LIMITATIONS: Where reformation is not incident to the main relief sought, but is an essential prequisite to the asking of any relief, subsection 4 of section 338, Code of Civil Procedure applies, and the action must be brought within three years of the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. This rule applies as well where the reformation is sought by the defendant. *But it does not apply where reformation is sought as an incident to other relief.* In such case the right to reformation is not barred as long as an action for such relief might be brought." (22 Cal. Jur., page 723, par. 11.)

Also see, *Hutchinson v. Ainsworthy,* 73 Cal. 455:

> "The facts upon which plaintiff's right to sue are based, and upon which defendant's duty has arisen, coupled with the facts which constitute the latter's wrong, make up the cause of action. If these facts taken together give a unity of right, they constitute but one cause of action. In equity, the relief or the enforcement of a single right may be varied, and the facts essential to such relief may be set out without objection as auxilliary to the right to be enforced."

In the case at bar, the object of the action is to collect a single debt, and to enforce a single lien to redress a single wrong. To accomplish this object, dual relief is sought, but this circumstance, as frequently sought, does not constitute two causes of action. Pomeroy, at section 459 of his work on remedies, in discussing the question uses the following language:

> "Actions brought to reform instruments in writing * * * and the like, and to enforce the same as reformed by judgments for the recovery of money due on the contracts, or for the foreclosure of mortgages, or for the recovery of the possession of land conveyed by deed, fall within the same general principle. One cause of action only is stated in such cases, however various may be the relief demanded and granted." (*Meyer v. Van Collem,* 7 Abb. Pr. 222; *McClurg v. Phillips,* 49 Mo. 315.)

Also see, *South Tule, etc. Ditch Co. v. King,* 144 Cal. 455:

> "It is urged by the plaintiff that defendant's second amended answer should not have been allowed because the relief therein asked is on the ground of mistake, and is barred by the provision of subsection 338, Code of Civil Procedure (Cal.)."

The section provides that "an action for relief on the ground of fraud or mistake" is barred within three years. Defendants knew of the mistake more than three years before the action was commenced.

This is not an action for relief on the ground or mistake, and therefore has no application. It is an action in effect to determine the title to one-half cubic foot of

water claimed by the plaintiff. The defendants claim that they have at all times been in possession of the one-half foot, and that they never conveyed it, because the mistake in the deed. In other words, the question as to the mistake is made by the way of defense to an affirmative claim made by the plaintiff, *and is only incidental to the main question.*

See *Gardner v. Guarantee Co.,* 137 Cal. 75:

> "Hence, while the contract remains in force, and not barred by the statute of limitations, there can be no bar to the real intention of the parties or to the reformation of the contract."

Also see:

> *Carman v. Athern,* 77 Cal. App. 2d 595, to same effect.

The Statute Does Not Commence to Run Until the Discovery of the Mistake.

It is too elemental to take much time on this point of the California Statute, Code of Civil Procedure, Section 338, and the cases cited heretofore establish this point. However, in the instant case the plaintiff pleads discovery as of June 14, 1948 [Tr. 5]. But a reading of the complaint as a whole discloses that a dispute over the interpretation of the clause terminating the lease could not have occurred until actual "cessation of hostilities" and possibly until the proclamation of the President of the United States on December 3, 1945.

POINT II.

The Reformation Here Merely Asks the Court to Determine What the Instrument Was Intended to Mean.

The code of the State of California lays down the rule for the inquiry into the meaning of a written contract.

Civil Code, Section 3401:

> "Scope of Inquiry.—In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language was intended to be."

Also see:

F. P. Cutting v. Peterson, 164 Cal. 44.

POINT III.

The Court Below Erred in Not Holding the Contract Lease Terminated on the "Cessation of Hostilities."

There is but one question to be decided by the court in the instant case, and that is, What is the meaning of the phrase "Six months from the date of the termination of the unlimited emergency, as declared by the President of the United States on May 27, 1941 (Proclamation 2487). The court below held in its memorandum opinion that the laws of the State of California must be followed in the construction and interpretation of the lease contract. We accept this view. In the first place we are dealing here with a proclamation. What is the legal effect of a Presidential Proclamation? "In English law the instrument is thus defined; Proclamation (Proclomatio) is a notice

publicly given of anything whereof the King thinks fit to advise his subjects." *Lapyre v. U. S.,* 84 U. S. 191. The proclamation by the President is his official, public announcement of an order. No particular form is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained.

Wood v. Beach, 156 U. S. 548.

POINT IV.

The Words of a Contract Are to Be Construed and Understood in Their Ordinary and Popular Sense.

Even if the word "End of War" was used, the popular conception would be the end of "actual hostilities."

Civil Code, Section 1644:

> "Ordinary Meaning of Words.—The words of a contract are to be understood in their ordinary and popular sense, rather than to their strict legal meaning; * * *"

And the intent of the terms of a contract should never be extended.

Civil Code, Section 1648:

> "Intent Never to Be Extended.—However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

This court has laid down the rules for the construction of a contract of this kind in, *Samuels v. United Seamans Service,* 165 F. 2d 409.

War in its material sense must be distinguished from war in its legal sense. *U. S. v. Cain, 72* Fed. Supp. 897.

War may come to end by the simple cessation of hostilities.

The Three Friends, 166 U. S. 1.

Corpus Juris discloses that the following wars ended merely by a cessation of hostilities. Sweden-Poland, 1716; France-Spain, 1720; Texas-Mexico, 1836 and the Spanish wars with American colonies.

Even the use of the words "end of war" to the layman and the soldier, mean the "capitulation by the enemy."

To the layman and to the soldier, the words "engaged in war" convey the thought of actual warfare, capitulation of the enemy forces. The aftermath of actual warfare necessitates political and legal cognizance of a "state of war," but that is something apart from the common understanding of the time the country ceases to be "engaged in war."

Stinson v. New York Life, 167 F. 2d 233.

The President may issue proclamations when he thinks it proper to give notice or information to the public.

Muir v. Louisville & N. R. R. Co., 247 Fed. 888.

They have no effect as law in the absence of constitutional or congressional authority. (Idem.)

See text, *The President Office and Powers,* by Corwin, page 363 of notes.

It is clear that the "unlimited emergency" as defined by the Presidential proclamation is a question of fact. It

did not create an emergency. It just proclaimed to the people that one existed. It is clear that the proclamation of May 27, 1941, advised the people that the emergency consisted of a threat to the security of the United States by the "axis belligerents."

We quote from the second paragraph thereof:

> "Whereas a succession of events makes plain that the objectives of the *axis belligerents* in such war are not confined to those avowed at its commencement, but includes overthrow throughout the world of existing democratic order, and a world wide domination of the peoples and economics through the destruction of all resistance on land and sea and in the air."

At the time the lease agreement was signed we were actually at war with the "axis belligerents," which consisted of Germany, Austria, Italy and the Imperial government of Japan. Upon the unconditional surrender of the axis belligerents the emergency as defined by the Presidential proclamation was at an end. This was duly signified by the Presidential Proclamation of December 3, 1945, wherein the President declared "that there was a cessation of actual hostilities of World War II." To the same effect see:

Ex parte Blaney, 184 P. 2d 901 (Cal.);

Kaiser v. Hopkins, 6 Cal. 2d 537, 58 P. 2d 1278;

Hoover v. San Defer, 25 Wash. 2d 791, 171 P. 2d 1009;

State ex rel v. Listman, 157 Wash. 229, 288 Pac. 913;

U. S. v. Anderson, 76 U. S. 56.

Wherefore the appellant respectfully submits that the order dismissing this cause be reversed and the defendant be made to file his answer in due course.

Respectfully submitted,

ERWIN P. WERNER,

Appellant, In Pro. Per.